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NO. 82-6840

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

MICHAEL P. JAMES — PETITIONER

v.

COMMONWEALTH OF KENTUCKY — RESPONDENT

SL 4 PAGE 13

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August 11, 1983

COUNTERSTATEMENT OF THE QUESTION PRESENTED

WHETHER THE KENTUCKY COURT'S DECISION CONSTITUTES AN INDEPENDENT AND ADEQUATE STATE GROUND WHEN IT IS BASED ON CLEAR AND LONG-STANDING PRECEDENTS THAT A REQUEST FOR AN ADMONITION IS NOT THE EQUIVALENT OF A REQUEST FOR INSTRUCTION AND THAT PROCEDURAL RULES MUST BE STRICTLY FOLLOWED; ALTERNATIVELY, WHETHER THE ALLEGED ERROR IS HARMLESS?

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OPINION BELOW

Respondent respectfully corrects petitioner's statement that the opinion of the Kentucky Supreme Court "is not to be published." The opinion was published. James v. Commonwealth, 647 S.W.2d 794 (Ky. 1983). (Appendix, hereinafter A., pp. 1-3.)

JURISDICTION

Respondent accepts petitioner's statement of the jurisdictional facts.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner seeks relief before this Court under the Fifth and Fourteenth Amendments to the United States Constitution and accurately sets forth the relevant provisions.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

WHETHER THE KENTUCKY COURT'S DECISION CONSTITUTES AN INDEPENDENT AND ADEQUATE STATE GROUND WHEN IT IS BASED ON CLEAR AND LONG-STANDING PRECEDENTS THAT A REQUEST FOR AN ADMONITION IS NOT THE EQUIVALENT OF A REQUEST FOR INSTRUCTION AND THAT PROCEDURAL RULES MUST BE STRICTLY FOLLOWED; ALTERNATIVELY, WHETHER THE ALLEGED ERROR IS HARMLESS?

COUNTERSTATEMENT OF THE CASE

On April 23, 1981, the female victim in this case returned home from a university night class and found her front porch light unscrewed and her front door, which is always locked, inexplicably ajar (TE 182-184, 199). Examination of her apartment revealed her bed pillows "messed up" and the .22 caliber pistol she kept there was missing (TE 183-184). Early

the next morning she obtained the serial number of the gun and reported the burglary (TE 183-184, 198). Police officers investigating found evidence of possible entry through a front porch window (TE 199-201). Appellant and his wife, who were next door neighbors, observed the victim nailing her windows shut and inquired about the incident (TE 203-204).

On May 1, 1982, the victim came home from work and discovered the lower glass panel of her back storm door had been removed and a small pane broken out of the back door (TE 183-185). Again the pillows of her bed were messed up but nothing apparently taken this time. (Id.) She immediately told a neighbor who called the police (TE 185). Officer Clark found the storm door panel in some bushes beneath the porch (TE 222). One latent print on the inside of the glass panel was subsequently identified as appellant's by twenty-six positive comparison points (TE 222, 224, 290-293).

On May 6, 1983, the victim came home for lunch and was about to return to work around 12:30 p.m. when appellant knocked at the door and asked to call a doctor for his ill wife (TE 185-186). Although the victim barely knew appellant, he and his wife had used her phone on a few occasions during the past several months and she thought nothing of the request (TE 186, 203-205). As she dialed the number, appellant grabbed her mouth, poked a gun in her side, and threatened to kill her if she did not follow instructions (TE 186). While attempting to push hard to close the front door with his other hand, appellant accidentially fired his gun and became angry (TE 187). [During the subsequent investigation police officers found what appeared to be a .22 caliber bullet on the floor

near the door and a slash mark where it apparently hit the wall (TE 235, 263).]

Appellant took his victim into the bedroom where he bound her hands with a strip of cloth and gagged her mouth with a similar strip having a knot already tied in it (TE 187). Appellant leaned her across the bed, covered her head with bed linens and then proceeded to walk about the house and search her purse. (Id.) After a long time he stood her up, pulled the hood of her sweater over her head and took her to his apartment, after checking to make sure no one was watching (TE 188). The victim was reminded she would be killed if she tried anything. (Id.) After ensuring they were not seen, he took her to the bedroom, ordered her to undress and to climb on the towel he had placed on the bed (TE 189). After raping her, appellant sat on the bed for a long time and would not allow her to dress. (Id.) Subsequently, appellant permitted her to get dressed but then told her to go in the bathroom and wash (TE 190).

Appellant seemed unable to decide what to do with her and sat in the bedroom for a long time and then in the living room where she was told to sit in the middle of the floor. (Id.) At one point appellant mentioned putting her in the attic (TE 191). Throughout the afternoon the victim promised to tell no one and kept suggesting reasons he should let her go before anyone came home (TE 190). She also said she could not explain to her father if the second gun he purchased for her was missing from her purse. (Id.) Late that afternoon appellant was finally persuaded to return her purse and let her go (TE 190-191). Her supervisor testified she arrived between

4:30 and 5:00 p.m. and was visibly upset (TE 322-324). After calming her down and learning of the incident, he urged her to call the police, but the victim explained she was afraid she would be killed if he was not immediately apprehended (TE 192, 324-325).

She left work and went to a girlfriend's and then to a friend who called the police at approximately 6:00 p.m. (TE 192, 237-238, 255). Following the police interview during which she gave them appellant's first name (the only name she knew) and address, the victim was taken to the hospital for examination and tests (TE 192, 227, 256-257). Subsequent lab analysis revealed semen on the vaginal swabs, vaginal smear, a Tampon, and her panties (TE 320).

Appellant's last name was obtained through fire department records of a recent fire and an arrest warrant obtained (TE 256-257). At his residence, appellant's wife said he was refereeing a basketball game at Kentucky State; therefore, four officers proceeded to the gym where they found an intramural game in progress and recognized appellant by his height, 6 feet 11 inches. (TE 103, 228, 257, 270). When the game concluded in a few minutes, appellant picked up a gym bag from the bleachers and began to leave (TE 229, 258, 270). He was stopped at the door and placed under arrest outside, the gym bag being taken from him at the time (TE 230, 258, 270). The bag was placed in the front seat of the police cruiser and appellant in the back (TE 230). At that time and when questioned later, appellant repeatedly denied knowledge or ownership of the gym bag and said it was handed to him by "some dude" (TE 106, 238, 274, 275). Appellant declined to consent

to a search of his residence and was transported to headquarters while a search warrant was obtained for the apartment (TE 230-231). Appellant's wife apparently consented to the search at the residence (TE 86, 231, 259).

During the execution of the search, Trooper Sparks and Detective Courtney, Frankfort Police Department, went to the cruiser for additional evidence bags (TE 111, 232, 272). Reaching for evidence bags under the gym bag, which remained on the front seat, Trooper Sparks felt what seemed through the canvas to be a gun. (Id.) He took the gym bag inside where it was found to contain the .22 caliber pistol reported stolen by the victim on April 23 and two cloth strips, one with a knot in it (TE 232-234, 272-273). During the suppression hearing Detective Courtney stated while in the cruiser he raised the pistol without removing it to ascertain it was a gun and then took the bag inside where the contents were removed (TE 112). At trial the testimony from both officers was that the bag was opened in the house, not in the car (TE 232, 245, 247, 272, 279).

Analysis of the cloth strips revealed saliva of the Group A secreter in the knot and a blood test disclosed the victim was a Group A secreter (TE 313-314). A towel from appellant's bathroom contained semen, but in all instances the quantities of semen were too limited to determine blood type (TE 318-320).

The defense presented two witnesses, one of whom said he was in the driveway from approximately noon until late afternoon and that he never saw the victim (TE 337-345). He recalled seeing appellant leave around 2:00 p.m. and not return (TE 342). He also testified he was in the basement of

appellant's apartment with the owner around 12:30 p.m. but heard nothing except a record player (TE 341). The building owner said he often showed Mr. Bates the progress being made in the basement renovation but could not recall any specific date (TE 351-352).

After a jury recess, the proceedings continued as follows:

> "Mr. Peale [Defense Counsel]:
>
> We have closed and has (sic) a matter in regards to the instructions.
>
> OFF THE RECORD
>
> Mr. Peale:
>
> Note that the defendant objects to several of the instructions being given to the jury.
>
> Judge Meigs:
>
> Overruled.
>
> Mr. Peale:
>
> The defendant requests that an admonition be given to the jury that no emphasis be given to the defendant's failure to testify which was overruled." [TE 425-426; A. 4-5].

The jury was then instructed and returned a verdict of guilty on charges of second-degree burglary, first-degree rape and receiving stolen property. (TR 37-38.)

At the second stage of the bifurcated proceeding evidence was introduced regarding the charge of first-degree persistent felon, and the defendant testified in his own behalf (TE 360-395). Evidence of convictions for forgery in Nebraska and murder in Virginia were introduced (TE 361-365). Petitioner was found guilty and a sentence of life imprisonment imposed in accordance with the jury's recommendation (TR 53-54).

On direct appeal to the Kentucky Supreme Court petitioner raised six issues including:

> "Appellant's Convictions Of The Principal Offenses Were Obtained In Violation Of Due Process Of Law Where The Trial Court Refused To Admonish The Jury Regarding Appellant's Right Not To Testify."

The Commonwealth responded that the alleged constitutional issue was not preserved for appellate review in that petitioner improperly attempted on appeal to equate "admonitions" and "instructions," and that, even if the question were preserved, any error was harmless beyond a reasonable doubt. This question was decided by the Kentucky Supreme Court as follows:

> "James requested that the trial court give an 'admonition' to the jury that no emphasis be given to James' failure to testify. This request was denied by the trial court. In his argument on appeal James attempts to equate his request for an admonition with a request for an 'instruction' on failure of a defendant to testify. Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), held that a state trial judge has the constitutional obligation to give a prophylactic instruction upon proper request to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify. There is a vast difference in a request for an admonition and a requested instruction. James was entitled to the instruction, but did not ask for it. The trial court properly denied the request for an admonition." James v. Commonwealth, 647 S.W.2d 794, 795-796 (1983).

REASON FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION IN THAT THE KENTUCKY SUPREME COURT DECIDED PETITIONER'S CASE ON AN INDEPENDENT AND ADEQUATE STATE PROCEDURAL GROUND AND DECLINED TO RENDER AN ADVISORY OPINION ON WHETHER THE CLAIM OF ERROR WOULD, IN ANY EVENT, BE DEEMED HARMLESS BEYOND A REASONABLE DOUBT.

Petitioner invokes this Court's jurisdiction on the claim that: "THE OPINION OF THE SUPREME COURT OF KENTUCKY

REPRESENTS AN OBVIOUS ATTEMPT BY THAT COURT TO CIRCUMVENT THE MANDATE OF THIS COURT IN CARTER V. KENTUCKY. . . ." He predicates his claim on the assumption that a request for an "admonition" on his right not to testify is equivalent to a request for an "instruction" under Carter v. Kentucky, 450 U.S. 288 , 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981). The Commonwealth respectfully submits that the state court decision followed well established procedural rules, rather than some arbitrary denial of an opportunity for petitioner to present his constitutional claim. Thus, the state court decision rests upon independent and adequate precedural grounds which prevent direct review.

As early as 1922, in Miller v. Noell, 193 Ky. 659, 237 S.W. 373 (1922), the highest court in Kentucky made it clear that there is a substantial difference between an "admonition" and an "instruction."

> ". . .[A]n 'admonition' is any authoritative oral communication or statement by way of advice or caution, made by the court to the jury during the trial of a case, respecting their duty or conduct as jurors, the admissibility or nonadmissibility of evidence offered by the parties, or the purpose, if competent only for a particular purpose, for which any of that admitted might or should be considered by them. But by the Civil Code of Practice and the courts of the state the term 'instructions' has a wholly different legal meaning. The instructions are from the court and addressed to the jury, and contain the law of the case by which they are to be guided and controlled in arriving at a verdict." Id. at 374. [Emphasis added.]

Miller was an action for slander in which counsel attacked the trial court's two "instructions" advising the jury certain testimony was to be considered only insofar as it bore on the question of intentional malice. The court took the opportunity to clarify the substantial differences between these

"admonitions" and written instructions. Id. Then noting there was no objection to the admonitions, the court declined to consider the merits of the claim.

Since Miller, the Kentucky courts have consistently and repeatedly adhered to the distinction between admonitions and instructions as the following cases illustrate. In Brown v. Simpson, 293 Ky. 755, 170 S.W.2d 345 (1943), a civil action for damages for assault and battery, appellant complained that the trial court's admonition limiting the effect of reputation evidence was incomplete. Citing Miller, the appellate court noted the absence of any objection and declined to rule on the alleged error in the admonition. Id. at 347. The opinion continued:

> "This Miller case also disposes of Brown's contention that the admonition was an instruction and that the court having given it sua sponte it was incumbent upon him to give it correctly, by pointing out that an 'admonition' is but an oral statement by way of advice made by the court to the jury during the trial respecting the purpose for which such evidence may be considered; while 'instructions' are always written, unless the parties agree otherwise, and contain the law of the case which guides the jury in reaching a verdict." Id.

In Weichhand v. Garlinger, Ky., 447 S.W.2d 606 (1969) the court held it was error, but harmless error, to give an admonition that evidence of a criminal conviction was not conclusive on the question of negligence in a related civil action. In discussing the issue, the court again emphasized the distinction between requests for instructions and admonitions.

> "On the trial of the instant case evidence of the criminal conviction was admitted, over Garlinger's objections. He made no request, at the time of admission, for any admonition. However, at the close of the trial he requested an instruction that the criminal conviction could be considered as evidence of negligence but was not

> conclusive. The trial court refused to give such an instruction but did give an admonition to that effect." Id. at 610. [Emphasis by the Court.]

Additionally, Kentucky Rule of Criminal Procedure [hereinafter RCr] 9.54 provides:

> (1) It shall be the duty of the court to instruct the jury in writing on the law of the case. The instructions shall be read to the jury prior to the closing summations of counsel.
>
> (2) No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specificlly the matter to which he objects and the ground or grounds of his objection.
>
> (3) The instructions shall not make any reference to a defendant's failure to testify unless so requested by him, in which event the court shall given an instruction to the effect that he is not compelled to testify and that the jury shall not draw any inference of guilt from his election not to testify and shall not allow it to prejudice him in any way.

Subsections (1) and (2) of this Rule have been in effect since March 1, 1974, and Subsection (3) became effective September 1, 1981, four and one half months before petitioner's trial. Kentucky courts have consistently held, in accordance with Subsection (2), that no claim of error regarding instructions may be raised on appeal unless a proper instruction was tendered or the specific grounds for an objection were presented to the trial court. See, for example: Sampson v. Commonwealth, Ky., 609 S.W. 2d 355, 360 (1980); Wilson v. Commonwealth, Ky., 601 S.W.2d 280, 285 (1980); Nickell v. Commonwealth, Ky., 565 S.W.2d 145, 148 (1978); Long v. Commonwealth, Ky., 559 S.W.2d 482, 484-485 (1977); Eversole v. Commonwealth, Ky., 550 S.W.2d 513, 515-516 (1977); Hunt v. Commonwealth, Ky., 466 S.W.2d 957, 959 (1971); McCranney v. Commonwealth, Ky., 449 S.W.2d 914, 915 (1970).

Petitioner herein not only failed to tender a proper written instruction or state specifically his grounds for objection to the instructions given but also asked for improper relief in the form of an "admonition" that "no emphasis" be given to the defendant's failure to testify. Counsel did not refer to the court's written instructions as admonitions in the previous breath. (TE, 425, A.4.) He correctly referred to them as "instructions." Yet he plainly chose the term "admonition" seconds later when he stated a request for relief. As recently reiterated, in a slightly different context, in Hopewell v. Commonwealth, Ky., 641 S.W.2d 744 (1982):

> "The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court." Id. at 745.

The present case bears a strong similarity to the claim raised in Wolfe v. North Carolina, 364 U.S. 177 (1960) where the petitioner alleged the independent procedural state grounds relied upon by the North Carolina State Court were untenable and inadequate. This Court held there was no federal question presented after reviewing North Carolina decisions consistently and repeatedly applying the same procedural rules. As stated therein:

> "Examination of the whole course of North Carolina decisions thus precludes the inference that the Supreme Court of North Carolina in this case arbitrarily denied the appellant an opportunity to present their federal claim. * * * 'Without any doubt it rest with each state to prescribe the jurisdiction of its appellate courts. The mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise, and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon question of local or general law.' [Citations omitted.]

> '[W]hen as here there can be no pretence that the [state] court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong.'" Id. at 194-195.

The North Carolina Supreme Court did not decide the federal question raised "because of the requirement of rules of state procedural law within the constitutional power of the states to define, and here clearly delineated and evenhandedly applied." Id. at 196. Similarly, the Kentucky Supreme Court declined to decide whether there was constitutional error in the failure to give an instruction on the right not to testify because no such instruction was requested and petitioner failed to follow the rules of state procedural law.

The requirement of a contemporaneous request for an instruction, when an instruction is desired, serves similar important state interests as those enunciated in Wainwright v. Sykes, 433 U.S. 72, 87-90 (1977). When a state has so clearly explained the difference between an admonition and instruction and has plaintly set forth that to which the defendant is entitled, failure to honor state procedural rules may well encourage "sandbagging" and avoidance of the desirable result that state "proceedings be as free of error as possible." Id. at 89, 90. Accordingly, respondent submits that the petition should be denied.

Petitioner also argues that the state court did not decide the alleged error was harmless and attempts to infer that the court must have reached the opposite conclusion. Petitoner relies on Commonwealth v. McIntosh, 646 S.W.2d 43 (Ky. 1983), but no such conclusion can be supported by that

case. In McIntosh the court expressly stated:

> "Prior to the trial judge's instructions to the jury, the defense counsel requested an instruction on his election not to testify. The instruction was not given." Id. at 44.

By contrast, the court noted in the present case:

> "There is a vast difference in a request for an admonition and a requested instruction. James was entitled to the instruction, but did not ask for it. The trial court properly denied the request for an admonition." James, supra, at 795-796.

Since the question was not preserved for appellate review there was no need for the court to render an advisory opinion on the result if the question had been properly raised. It is the longstanding policy and practice of the Kentucky Supreme Court to refuse to render advisory opinions or to answer moot questions. See Dillingham v. Commonwealth, Ky., 249 S.W.2d 827, 828 (1952) and cases on preservation of instruction issues noted above.

Should this Court decide that the state decision does not rest upon an adequate state ground, then the cause should be remanded to the Kentucky Supreme Court for further consideration. See: Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). Respondent respectfully submits that the evidence of petitioner's guilt was overwhelming. He was positively identified as the perpetrator of the rape. Examination of the victim revealed semen in the vagina, and appellant that night had in his possession two strips of cloth like those used to bind and gag the victim. One stip was knotted and contained saliva of the same blood group as the victim's. Petitioner also had in his possession the pistol recently stolen from beneath the victim's pillows. His fingerprints were found on the inside of the storm door bottom panel the day it was

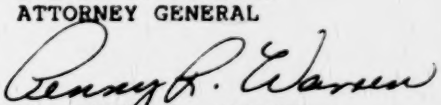
forcibly removed and the victim's pillows again disturbed. The state court should be given an opportunity to decide whether the failure to give an instruction is nonprejudicial error in this case pursuant to Chapman v. California, 386 U.S. 18 (1967).

CONCLUSION

For the foregoing reasons respndent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

STEVEN L. BESHEAR
ATTORNEY GENERAL



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NO. 82-6840

IN THE
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MICHAEL P. JAMES PETITIONER

v.

COMMONWEALTH OF KENTUCKY RESPONDENT

CERTIFICATE OF SERVICE

I, Penny R. Warren, counsel for the respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11th day of August, 1983, I served the petitioner with Brief for Respondent in Opposition to Petition for Writ of Certiorari by placing a copy of same in the United States mail, first-class postage prepaid, and addressed to the Honorable C. Thomas Hectus, Gittleman & Barber, 635 West Main Street, Louisville, KY 40202, Counsel for Petitioner.

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APPENDIX

Supreme Court of Kentucky Opinion, rendered March 30, 1983 in James v. Commonwealth..... 1 - 3

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Michael P. JAMES, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

Supreme Court of Kentucky.

March 30, 1983.

Defendant was convicted in the Circuit Court, Franklin County, Henry Meigs, J., of second-degree burglary, first-degree rape, and receiving stolen property, and he appealed. The Supreme Court, Stephenson, J., held that: (1) trial court did not err in declining to sever charges against defendant; (2) evidence was sufficient to submit charge of burglary to jury; (3) search of gym bag did not violate defendant's Fourth Amendment rights; (4) trial court properly refused to give "admonition" to jury that no emphasis be given defendant's failure to testify; (5) prior out-of-state forgery conviction was properly considered in persistent felony offender phase of trial; and (6) trial court properly ordered misdemeanor conviction to be served consecutively with felony convictions.

Affirmed.

1. Criminal Law ⇐620(6)

Where crimes of second-degree burglary, first-degree rape, and receiving stolen property were closely related in character, circumstances, and time, defendant was not prejudiced by joinder of offenses for trial, and trial court did not abuse its discretion in declining to sever charges. KRS 510.040, 511.030, 514.110; Rules Crim.Proc., Rule 6.18.

2. Burglary ⇐45

In prosecution for second-degree burglary, evidence of defendant's fingerprint at scene of crime and his possession of stolen pistol was sufficient for jury. KRS 511.030, 514.110(2).

3. Searches and Seizures ⇐7(10)

Where defendant had told arresting officer that gym bag in his possession did not belong to him, but was merely handed to him by another, defendant had no legitimate expectation of privacy in bag, and thus could not claim that subsequent search of bag violated his Fourth Amendment rights. U.S.C.A. Const.Amend. 4.

4. Criminal Law ⇐787(2)

While criminal defendant was entitled to prophylactic instruction on jury's consideration of defendant's failure to testify, trial court properly denied defendant's request for "admonition" to jury that no emphasis be given to his failure to testify.

5. Criminal Law ⇐1202(1)

Where defendant's previous conviction in Nebraska was for forgery, which was felony in Kentucky, such previous conviction was properly considered in determining defendant to be persistent felony offender after subsequent Kentucky conviction, notwithstanding that defendant had not served time in prison on previous forgery conviction. KRS 532.080(2)(a).

6. Criminal Law ⇐991(1.5)

Where defendant was convicted of felonies while on parole for different crime, trial court did not err in ordering defendant's misdemeanor conviction to be served consecutively, rather than concurrently, with his felony convictions. KRS 532.060, 532.090, 532.110(1), 533.060(2).

Jack Emory Farley, Public Advocate, John Michael Brown, Gittleman & Barber, Louisville, for appellant.

Steven L. Beshear, Atty. Gen., Penny R. Warren, Asst. Atty. Gen., Frankfort, for appellee.

STEPHENSON, Justice.

Michael P. James was tried and convicted for the offenses of second-degree burglary, KRS 511.030, first-degree rape, KRS 510.040, and receiving stolen property, KRS 514.110. At the persistent felony offender phase of the trial, James was convicted as a

first-degree persistent felony offender and the conviction for first-degree rape was enhanced to life imprisonment. James was sentenced to life imprisonment on the persistent felony offender charge and to ten years' imprisonment on the burglary charge to run concurrently. He was sentenced to twelve months in jail on the receiving stolen property charge to run consecutively with the two felonies. We affirm.

[1] James' first assertion of error is that the trial court erroneously declined to sever the charges against him. He argues that the requirements for joinder under RCr 6.18 are not present. The three crimes here were closely related in character, circumstances, and time, and we are of the opinion there is no showing of abuse of discretion and prejudice in the joinder of the offenses for trial. *Seay v. Commonwealth*, Ky., 609 S.W.2d 128 (1981) and *Cardine v. Commonwealth*, Ky., 623 S.W.2d 895 (1981). The burglary of the victim's apartment, the rape and finding property stolen from the apartment in the possession of James all occurred within a two-week period.

[2] The evidence of the broken pane of glass and James' fingerprint in our opinion is sufficient evidence to submit the charge of burglary to the jury.

"If under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict." *Trowel v. Commonwealth*, Ky., 550 S.W.2d 530, 533 (1977).

Mere possession of the stolen pistol is sufficient to submit the case to the jury. KRS 514.110(2). James offered no explanation for his possession of the pistol, and there is nothing in the evidence to show that it was unreasonable for the jury to find a guilty verdict.

[3] When arrested on the rape charge, James was carrying a gym bag. The arresting officer asked James about the bag and was informed by James that someone had handed it to him and that he did not know to whom it belonged. Later, while the gym bag was in the police cruiser and officers were executing a search warrant by searching James' house, one of the officers ran his hand under the gym bag on the car seat and felt what seemed to him to be a pistol. He then proceeded to open the bag and found a pistol, which was later identified by the victim as being the pistol stolen from her apartment some days prior to the rape.

James moved to suppress the evidence of the pistol on the ground of an illegal search and seizure. He did not testify at the suppression hearing. At the hearing, the arresting officer testified that James had denied being owner of the bag and that some "dude" had handed it to him as he left the gymnasium. The trial court denied the motion to suppress. James argues the major premise that the Commonwealth must rely on the "plain view" and "exigency" cases in this situation and that these propositions do not apply. This argument misses the real question, which is analogous to the expectation of privacy cases. We are of the opinion the search here did not violate any expectation of privacy on the part of James. He denied being owner of the bag. There is no "search" here for purposes of the Fourth Amendment, and there is a total absence of any legitimate expectation of privacy. Cf. *Sussman v. Commonwealth*, Ky., 610 S.W.2d 608 (1981), and *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980).

[4] James requested that the trial court give an "admonition" to the jury that no emphasis be given to James' failure to testify. This request was denied by the trial court. In his argument on this appeal James attempts to equate this request for an admonition with a request for an "instruction" on failure of a defendant to testify. *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), held that a state trial judge has the constitutional obligation to give a prophylactic instruction upon proper request to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify. There is a vast difference in a request for an admonition and a requested instruction. James

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was entitled to the instruction, but did not ask for it. The trial court properly denied the request for an admonition.

[5] The proof of the Commonwealth on the persistent felony offender phase of the trial was that James entered a guilty plea in Nebraska to a felony charge of forgery in 1972 and was sentenced to probation for a period of two years. Later that year in Virginia, James entered a guilty plea to murder and was sentenced to twenty-eight years' imprisonment. James was on parole from this conviction when he committed the offenses here.

James argues that the Nebraska conviction does not meet the requirements of KRS 532.080(2)(a):

> "(2) . . . As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:
>
> "(a) That a sentence to a term of imprisonment of one year or more or a sentence to death was imposed therefor; . . . ."

The Commentary accompanying this subsection in the Kentucky Penal Code, Final Draft November 1971, p. 347, is as follows:

> "Subsection (2) sets forth a definition of a previous felony conviction. It requires in Subdivision (a) that the previous offense must have been accompanied by a sentence of imprisonment for one year. *This requirement seeks to account for the possibility of conviction from a state which has a distinction between felony and misdemeanor that is different from that used in this state.* Thus, although such conviction is for an offense designated in that other state as a misdemeanor, it can be treated as a felony for purposes of this statute if it carried a penalty of one year or more." (Emphasis added.)

We have consistently relied upon the Commentary as an expression of legislative intent. It is apparent that the statute does not require actual imprisonment as was the case in the former statute, and reasons for the use of the term "imprisonment" in and of itself are fully explained in the Commentary. Here the offense in Nebraska was a forgery, which is a felony in this state.

[6] Finally James argues that the trial court erroneously ordered the misdemeanor conviction to be served consecutively with the felony convictions. James argues that our opinion in *Powell v. Payton*, Ky., 544 S.W.2d 1 (1976), should be applied to the situation here. It is true that as a general proposition KRS 532.110(1) construed together with KRS 532.090 and KRS 532.060 mandates that a misdemeanor sentence be served concurrently with the indeterminate sentence for a felony. That proposition would obtain here save for the application of KRS 533.060(2) which provides in part that when a defendant "is convicted or enters a plea of guilty to a felony committed while on parole, . . . , the period of confinement for that felony shall not run concurrently with any other sentence."

The legislature has determined that offenses committed while on parole shall be dealt with in a harsher manner, and this clear expression of the legislature takes this case out of the rule in *Powell*.

The judgment is affirmed.

All concur.

HOWARD D. STURGILL & SONS, Appellant,

v.

Timothy FAIRCHILD and Kentucky Workers' Compensation Board, Appellees.

Supreme Court of Kentucky.

March 30, 1983.

Appeal was taken from decision of the Court of Appeals reversing judgment of the

JUDGE MEIGS:

Ladies and gentlemen, I remind you once again of the admonition given before the recess and unless you indicate otherwise, I will assume that you have not discussed the case among yourselves nor allowed anyone to discuss it with you during the recess. Does the Commonwealth waive the call?

MR. CORNS:

We do, Your Honor.

JUDGE MEIGS:

Does the defendant waive the call?

MR. PEALE:

We do, Your Honor.

JUDGE MEIGS:

Call your witness. You have closed, I am sorry.

MR. PEALE:

We have closed and has a matter in regards to the instructions.

OFF THE RECORD.

MR. PEALE:

Note that the defendant objects to seveal of the instructions being given to the jury.

JUDGE MEIGS:

Overruled.

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MR. PEALE:

The defendant requests that an admonition be given to the jury that no emphasis be given to the defendant's failure to testify which was overruled.

JUDGE MEIGS:

Ladies and gentlemen of the jury, these are your instructions as to the law applicable to the facts which you have heard from the witness stand in the course of this trial.

No. 1. You will find the defendant, Michael P. James guilty under this instruction if and only if you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Franklin County, Kentucky, on or about the first day of May, 1981, and before the finding of the indictment herein, he entered unlawfully and without permission the dwelling of Donna Richardson.

(b) That in so doing he knew he did not have such permission, and

(c) That he did so with the intention of committing the crime of theft therein.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than five

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